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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

S.A.R.L. de GESTION PIERRE CARDIN,

Petitioner,

-against-

MARVIN W. MORSE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals disregard a long-standing principle of contract law and establish a precedent that henceforth will preclude businessmen from reducing to writing potential contract terms by ruling that a contract arose from preliminary correspondence which expressly stated that the parties would not be bound until a written instrument had been drafted and executed?

2. Should this Court let stand the affirmance by a Court of Appeals of a jury award of "lost profits" for a proposed venture that was never organized and where absolutely no performance took place, where uncontradicted evidence at trial showed that actual product sales, when applied to plaintiff's own projected costs, would have resulted in <u>losses</u> to the plaintiff?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner S.A.R.L. de Gestion Pierre Cardin respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York which upheld a jury award of $435,000 (now $527,028.60 with interest) resulting from a purported breach of contract.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported and is set forth in Appendix A, infra at A-1, et seq. The opinion of the District Court, denying petitioner's motion for a judgment notwithstanding the verdict or, in the alternative, for an order setting aside the verdict and granting a new trial, is not reported and is set forth in Appendix B, infra, at B-1, et seq.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 8, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The courts below had jurisdiction on the basis of diversity of citizenship, 28 U.S.C. § 1332.

STATEMENT OF THE CASE

This case, which began primarily as an antitrust action, was tried to a jury on the question of whether a contract was created as the result of four letters exchanged between an employee of petitioner S.A.R.L. de Gestion Pierre Cardin ("Cardin"), Herve Duquesnoy ("Duquesnoy"), and plaintiff-appellee below, Marvin W. Morse ("Morse"). The purported contract related to a license for the sale of "Pierre Cardin" cigarette lighters in the United States. No contract was ever concluded and no performance of any kind took place.

The letters exchanged between Morse and Duquesnoy, alleged by plaintiff to constitute a contract, explicitly referred to Morse's request for a license as a "negotiation." The District Court charged the jury to limit its considera-

tion of the existence of a contract to the four letters summarized below, after observing on the record that:

> "I myself, do not believe that there was a binding contract in the case . . ."

A. The Four Letters

The first letter, written by Duquesnoy to Morse after a one hour meeting in Paris between Morse, his wife and daughter, and Duquesnoy, enclosed a draft, blank license agreement. The blank agreement was entirely in the French language. Duquesnoy wrote to Morse: "Will you study it [the draft, blank agreement] before pursuing our negotiations and will you let me know your possible comments." (emphasis added). The enclosed six page blank agreement was never filled out nor signed by anyone. Neither Morse nor Cardin ever agreed to its provisions.

The second letter, sent by Morse to Duquesnoy on February 28, 1977, enumerated five conditions, or, as Morse testified, "points that were necessary on our [Morse and his potential partners in the venture he never organized] side to make the contract a binding one or a good one for us." The third of these points was

> "negotiation and contract in English so we may know everything we are agreeing to." (emphasis added)

There was never a contract in English.*

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* This letter also advised Duquesnoy that Morse and his potential partners had agreed "in principal [sic]" to form a new company, but that they had "not as yet picked the name because we have not gone far enough due to the problem ..." of who would be authorized suppliers. This problem was likewise never resolved before the negotiations terminated without a written, signed contract, as previously agreed by Morse and Duquesnoy.

In the third letter, dated March 10, 1977, Duquesnoy wrote to Morse that "Mr. Pierre Cardin agrees on the conditions you propose to us." Duquesnoy's March 10 letter also conveyed to Morse the names of three Japanese Cardin manufacturing licensees of lighters, to which Morse would be restricted in negotiating for lighter supplies if the license were granted and a contract executed. Duquesnoy concluded this letter as follows:

> As soon as you have contacted them [the Japanese suppliers] and have actually organized this supplying, will you be kind enough to let me know about it, very quickly, so that I can ask to [sic] our lawyer in New York to start the wording of our contract which will begin on 1st July, 1977. (emphasis added).

Morse's reply to Duquesnoy's March 10, 1977 letter, the fourth and final letter alleged to constitute a contract,

was a letter dated March 14, 1977. In it, Morse objected to Duquesnoy's February 28, 1977 restriction of only three possible Japanese suppliers of lighters.* In this final letter, Morse acknowledged once again the validity of his own condition precedent to a binding contract, namely "[n]egotiations and contract in English so we may know everything we are agreeing to."

The agreed-to negotiations were never held. The contract was never signed. After Duquesnoy learned in Paris that an existing license agreement between Swank, Inc. and Cardin dating back to 1967, long before Duquesnoy had joined the Cardin organization, covered

* Morse proposed a search of alternative Italian, French, Japanese, Taiwanese and South Korean manufacturers of lighters which would act as Morse's suppliers and perhaps make possible the further negotiation and drafting of a license contract.

the cigarette lighters for which Morse now sought a license, Morse was advised by Duquesnoy that negotiations would have to be terminated.

No contract was signed. Neither side performed anything. No expenses of consequence were incurred. Duquesnoy had made a mistake.* Plaintiff then commenced this action as his reply.

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* In affirming a $1 jury award for "fraud" on the part of Duquesnoy, the Second Circuit, albeit recognizing that "there was no evidence from which the jury could conclude that Duquesnoy actually knew that the Swank license included cigarette lighters," nonetheless found that "the jury's finding of reckless indifference" by Duquesnoy "is reasonable," thus precluding a finding of mutual mistake. Under New York law, the $1 finding of no pecuniary damage substantively negates any basis for the fraud verdict. Reno v. Bull, 226 N.Y. 546 (1919).

B. The "Lost Profits" Award

The Court of Appeals also let stand a verdict of $435,000 (now $527,028.60 with interest) for a venture that never sold nor had an order for a single product, was never organized, and never concluded a single supply contract for any products. The award was based on guesswork and wholly speculative evidence. Plaintiff's entire damage theory was based on the unsupported assumption that U.S. sales of Pierre Cardin cigarette lighters would be ten times Canadian sales of allegedly similar products. The source of the amount of Canadian "sales" of Pierre Cardin lighters was a hearsay telex from one of Morse's alleged Japanese suppliers, a company not even mentioned as an authorized Pierre Cardin licensee for cigarette lighters by Duquesnoy in his March 10, 1977 letter to Morse.

This award was upheld by the District Court and affirmed by the Court of Appeals in the face of uncontroverted evidence at trial that, applying Morse's own cost estimates to the sale of actual U.S. licensed Pierre Cardin cigarette lighters (sold in the U.S. by Swank, Inc., Cardin's U.S. licensee during the same period for which Morse claimed "lost profits") Morse would have lost money if he had been able to contract for the license.

REASONS FOR GRANTING THE WRIT

I.

REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DISREGARDED A LONG-STANDING PRINCIPLE OF CONTRACT LAW AND ESTABLISHED A PRECEDENT THAT HENCEFORTH WILL PRECLUDE BUSINESSMEN FROM REDUCING TO WRITING POTENTIAL CONTRACT TERMS BY RULING THAT A CONTRACT AROSE FROM PRELIMINARY CORRESPONDENCE.

The four letters submitted to the jury by the District Court unequivocally conditioned the creation of a licensing agreement on the drafting, negotiation, and execution by Morse and Cardin of a written contract. No such contract was ever drafted or executed. As a matter of New York contract law, the District Court was obligated to enter summary judgment in favor of Cardin on the issue of the creation of a contract. The District Court erred in submitting this

question of law to the jury,* and by refusing to set aside the jury's verdict, the Court of Appeals erred in affirming the judgment of the District Court. A Writ of Certiorari should be granted to correct this surprising disregard of plainly applicable New York

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* New York courts, as well as the courts of many other jurisdictions, have routinely held that where

> the facts relating to the existence of a contract are essentially undisputed and, since the remaining issue of whether a contract was indeed established is a question of law, its resolution rests with the court. (Rochester Plumbing Supply Co., Inc. v. A. Beufort, Inc., 49 A.D.2d 78, 370 N.Y.S.2d 716 [1975]; Cortland Asbestos Products, Inc. v. J. & K. Plumbing & Heating Co., Inc., 33 A.D.2d 11, 304 N.Y.S.2d 54 [1969].

Gupta v. University of Rochester, 57 A.D.2d 731 (4th Dept. 1977) (emphasis added). See also, e.g., Associated Tabulating Service, Inc. v. Olympic Life Insurance Co., 414 F.2d 1306 (5th Cir. 1969); J. Russell Flowers, Inc. v. Itel Corporation, 495 F. Supp. 88 (N.D. Miss. 1980).

law by the courts below. Review by this Court is needed to undo a gross injustice to Cardin and to prevent unjust enrichment of a plaintiff who suffered no damage. More important, the Writ should be granted to prevent the establishment of a precedent that would inhibit businessmen from memorializing points of negotiation in correspondence for fear of being found to have entered into a binding contract at every step of the negotiations.

It is the law of New York, as well as the law of many other jurisdictions, that where the parties manifest in correspondence their intent not to be bound until a formal, written contract shall have been drafted and agreed to, and no such contract is ever drafted or entered into, no contract may be found by either a court or a jury. Scheck v. Francis,

26 N.Y.2d 466 (1970); Schwartz v. Greenberg, 304 N.Y. 250, 254 (1952); Brause v. Goldman, 10 A.D.2d 328 (1st Dept. 1960), aff'd, 9 N.Y.2d 620 (1961). See also, e.g., Transamerica Equipment Leasing Corp. v. Union Bank, 426 F.2d 273 (9th Cir. 1970); Chromalloy American Corp. v. Universal Housing Systems of America, Inc., 495 F.Supp. 544, 550 (S.D.N.Y. 1980); Restatement Second, Contracts 2d §§ 26, 27.* This has also been the settled rule in this Court

* The principle is succinctly stated in the Restatement of Contracts 2d:

> "[I]f either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract."
>
> Restatement Second, Contracts 2d, § 27, Comment (b).

since Chief Justice Marshall reversed a jury verdict for a plaintiff in a very similar case in 1804. Head v. Providence Insurance Co., 2 Cranch (U.S.) 127 (1804).

It was undisputed that Cardin and Morse both contemplated that any licensing agreement reached between them would be embodied in a formal written contract. More importantly, however, Cardin and Morse unambiguously communicated to each other that they would not consider themselves bound to a licensing agreement until a formal contract was negotiated, drafted and executed. Cardin made this clear by sending to Morse a Cardin form licensing agreement as a starting point for negotiations. Cardin's position that it required a formal, written contract was clear throughout the negotiations, and, even

in the last of the letters written by Cardin, which was held to have created a contract, Cardin's representative made reference to having Cardin's New York lawyer "start the wording of contract ...." (emphasis added). Morse responded to this letter by offering to go to Paris "to complete verbal negotiations ...."

What is especially perplexing about the decision of the Court of Appeals is that Morse himself, in the very documents that he argued created a contract between himself and Cardin, expressly conditioned the creation of a licensing agreement on the drafting and execution of a written contract. The key document on this point is Morse's letter of February 28, 1977, in which he sets forth his proposed terms and conditions for the license agreement. It was these

terms which Cardin purportedly accepted in Duquesnoy's letter of March 10, 1977, thereby creating a valid contract. The third of five conditions enumerated by Morse in his letter was: "3 - Negotiations and contract in English so that we may know everything we are agreeing to." (emphasis added). It is difficult to imagine a layman articulating more clearly his intent not to be bound to a contract and obligation until all of its terms had been fully negotiated and reduced to a formal instrument.

The Court of Appeals, however, found that intent of the parties was ambiguous on this issue. Notably, the Court of Appeals did not go on to explain what that ambiguity was. The result was to let stand a jury verdict for Morse when there was never anything for the jury to decide.

In this case, fundamental principles of contract law, as announced by competent state and federal courts, were flagrantly disregarded. In affirming the judgment below, the Second Circuit allowed a jury to engage in rampant speculation and sympathy for a plaintiff whose subjective intent as to whether he felt bound to a contract was legally of no moment to the issue of whether a contract had been entered into and, in fact, plainly contrary to his own written statements. Brown Bros. Electrical Contractors, Inc. v. Beam Construction Co., 41 N.Y.2d 397, 379 (1977); S.S.I. Investors Ltd. v. Korea Tungsten Mining Co., 80 A.D.2d 155, 159 (1st Dept. 1981), aff'd, 55 N.Y.2d 934 (1982).

If allowed to stand as precedent, the decision in this case would inhibit businessmen from negotiating openly and

clearly with prospective contract partners, for fear of having been found to have entered into a contract at every step of the negotiations. This result is contrary both to applicable law and public policy. A Writ of Certiorari should therefore be issued.

II.

THE SECOND CIRCUIT AFFIRMED A "LOST PROFITS" DAMAGE AWARD BASED SOLELY ON SPECULATION AND GUESSWORK.

Invoking this Court's well-settled rule that damage awards based on speculation and guesswork must be set aside, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946), the Second Circuit nonetheless affirmed a $435,000 jury award (now $527,028.60 with interest) which suffered from precisely these defects. Uncontroverted evidence at trial demonstrated that had plaintiff, a

typewriter wholesaler, commenced the venture for which he sought a contract, he would have suffered losses. To allow a jury nonetheless to consider "lost profits" as to a venture that was never organized and never sold a single product, computed on an assumption based on a hearsay document, is simply to permit plain guesswork and affirm a judgment resulting from sympathy.

In affirming the judgment below, the Second Circuit once again ignored applicable precedents setting aside damage awards as to proposed business ventures that never commenced operations, because of the inherent danger of speculative awards in such cases. Cramer v. Grand Rapids Show Case Co., 223 N.Y. 63, 68-69 (1918); Banker's Trust Co. v. Steenburn, 95 Misc.2d 967, 995 (Sup. Ct. 1978). This rule has been followed in New York's

federal courts. J.B. Lippincott Co. v. Lasher, 430 F.Supp. 993, 995 (S.D.N.Y. 1977).

Federal courts have likewise consistently rejected damage awards based on "expert" testimony that relied on unsupported assumptions of the type involved in the present case. Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 910-12 (2d Cir.), cert. denied, 369 U.S. 865 (1962); Flinkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), cert. denied, 355 U.S. 835 (1957); Bausch Mach. Tool Co. v. Aluminum Co. of America, 79 F.2d 217, 227 (2d Cir. 1936).

The Second Circuit's disregard of these applicable precedents, and allowance of a jury's guess as to the "profits" of a venture that was never organized, never had a source of supply or an order for a single product, in the face

of plain and undisputed evidence that the venture would have suffered losses, warrants this Court's review and reversal.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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